

CALFED BAY-DELTA PROGRAM

HABITAT CONSERVATION PLAN

PRELIMINARY ADMINISTRATIVE DRAFT RESPONSES TO SCOPING COMMENTS

The mission of the CALFED Bay-Delta Program is to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses in the Sacramento-San Joaquin Bay-Delta (Bay-Delta) system. CALFED will comply with the Federal Endangered Species Act of 1973, as amended, (ESA) through initiation of the formal consultation process pursuant to section 7 of the ESA and development of a Habitat Conservation Plan (HCP) pursuant to section 10(a)(1)(B) of the ESA. CALFED will comply with the California Endangered Species Act (CESA) through section 2835 of the California Fish and Game Code and development of a Natural Community Conservation Plan (NCCP).

The purpose of an HCP is to authorize some amount of incidental take of listed species while providing comprehensive, long-term conservation strategies that will allow for the recovery of any listed species and not contribute to the need to list any currently unlisted species. Under such a plan, non-Federal participants will be assured that, pursuant to the Department of the Interior's August 1994 "No Surprises" Policy, in the event of unforeseen circumstances affecting those species, no additional land, funds, or restrictions on covered Program actions will be required. A CALFED HCP will be subject to approval by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS).

An NCCP provides for the regional or area wide conservation of wildlife resources while allowing for compatible development and growth. Section 2835 of the NCCP Act authorizes the California Department of Fish and Game (CDFG) to permit the taking of any identified species whose conservation and management is provided for in an approved NCCP plan.

A supplemental Notice of Intent/Notice of Preparation (Notice) to prepare a Programmatic Environmental Impact Report/Environmental Impact Statement (EIR/EIS) was published in the *Federal Register* on August 28, 1997 pursuant to the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The Notice informed the public that CALFED is expanding the scope of its Programmatic EIR/EIS to include preparation of an HCP/NCCP and invited public comment. A leaflet describing the Notice, informing the public of the HCP options that may be considered and the scoping meeting schedule was mailed to the extensive CALFED mailing list.

Five public scoping meetings were held to encourage the public to assist in developing a suitable structure for a CALFED HCP. Scoping meetings were designed to provide the public with an overview of the CALFED Bay-Delta Program and an opportunity to provide comments and suggestions on the development of an HCP. The purpose of the scoping process is to identify public and agency concerns, identify and define the issues to be examined in an HCP, and identify

alternatives to be examined in an HCP. Both oral and written comments were solicited through the Notice and at the public scoping meetings. The public scoping meetings were held in Redding, Sacramento, Irvine, Los Banos, and Berkeley, California on September 16, 23, 24, and 30, 1997, and October 14, 1997, respectively. Approximately 90 people, in total, attended the five scoping meetings.

This report summarizes the many questions and comments received as part of the scoping process and organizes them by common themes. Responses to the questions and comments also are provided.

GENERAL QUESTIONS AND COMMENTS	RESPONSE
1) ESA protections can be provided outside the HCP process.	1) Under the Federal ESA, there are two primary mechanisms for authorizing incidental take of listed species: a section 7 consultation and its associated biological opinion for Federal actions and a Section 10(a)(1)(B) Permit and its corresponding HCP for non-Federal actions.
2) Problems inherent in other HCPs that make them inadequate, such as not requiring the recovery of species and being unable to respond to changing biological information, would be manifest in this process.	2) To receive approval from the USFWS or NMFS, a CALFED HCP/NCCP will need to allow for the recovery of any listed species covered by the plan and not contribute to the need to list any currently unlisted species covered by the plan. Further, a CALFED HCP/NCCP will include a process of adaptive management that will allow for revision or modification of species/habitat management to achieve the goals of the plan based on new information. A monitoring program also will be an integral part of an HCP/NCCP and will likely be the primary source of new information.
3) Will the CALFED process produce a single document or multiple documents?	3) The ultimate format of a CALFED HCP/NCCP is not known for certain at this time. The intention is that the CALFED Program documents will serve as the basis for an HCP/NCCP; however, supplemental documents, such as an Implementing Agreement, will likely be needed. It also is likely that a "single" comprehensive CALFED document will consist of multiple volumes.

<p>4) Define “extraordinary circumstances” and “economic compatibility”.</p>	<p>4) Extraordinary circumstances in the context of the “No Surprises” policy refers to changes in the circumstances surrounding an HCP that were not or could not be anticipated by HCP participants, including USFWS and NMFS, that result in a substantial and adverse change in the status of a covered species. Economic compatibility does not have a specific meaning in the context of HCPs; however, it was the intent of Congress in amending the Federal ESA to include section 10(a)(1)(B) permits to reduce conflict between endangered species protection and economic development.</p>
<p>5) Will there be integration with local HCPs?</p>	<p>5) Existing HCPs with issued 10(a)(1)(B) permits will not be affected by a CALFED HCP/NCCP. CALFED will take into consideration, however, completed HCPs as well as those under development within and adjacent to the CALFED Program area in developing its own HCP/NCCP. It also is possible that a CALFED HCP/NCCP will apply to some geographic areas that already have HCPs because the activities covered by the two plans may be different.</p>
<p>6) Does “no net loss” of habitat mean a ratification of the status quo?</p>	<p>6) “No net loss” in the context of an HCP/NCCP generally means that there will be no loss of habitat value for any covered species during the term of the permit. For example, if a plan entails restoration or enhancement of a particular habitat, the total acreage of that habitat type may decrease without diminishing the overall value. Because one of CALFED’s objective is restoration of the ecosystem and recovery of threatened and endangered species, the result of the CALFED Program should be an improvement in habitats over existing conditions.</p>

7) How do HCPs balance costs to the north Valley (e.g., higher risk of flooding)?	7) Issues such as costs, benefits, and risks of the CALFED Program should be addressed in the Program documents and the EIS/EIR, not the HCP. The purpose of an HCP/NCCP is to authorize incidental take of listed species, ensure adequate protection of those species, and provide assurances to HCP/NCCP participants.
8) Opposed to any HCP that doesn't lead to species recovery, including funding for recovery.	8) An HCP/NCCP for the CALFED Program will have to allow for the recovery of listed species covered by the plan and not contribute to the need to list currently unlisted species covered by the plan. To meet the section 10(a)(1)(B) permit issuance criteria an HCP must ensure that adequate funding to implement the plan is provided.
9) Legislation must be passed to ensure that HCPs provide for recovery, stewardship, prevention, science-based standards, growth management, legal assurances, public participation, adaptive management, enforcement, funding, implementation, and monitoring.	9) Comment noted.
10) HCPs lack standards and are a compromise.	10) The Federal ESA and its implementing regulations specify criteria which must be met before an HCP can be approved by the USFWS or NMFS. An HCP/NCCP is typically a negotiated agreement that balances economic development with long-term protection for the species covered by the plan.
11) Concerned with the ability of CALFED to adequately meet the standard HCP requirements to minimize and mitigate impacts.	11) The CALFED Program will include measures to minimize and mitigate the impacts of its actions; such measures will be described in both the Ecosystem Restoration Plan Program (ERPP) and the EIS/EIR. In addition, an HCP/NCCP for the CALFED Program may specify other minimization and mitigation measures. A section 10(a)(1)(B) permit cannot be issued if an HCP does not meet the issuance criterion, minimize and mitigate the impacts of the take to the maximum extent practicable.

12) An HCP is a thinly guised permit application and is in conflict with the expressed goal of CALFED for resource protection.	12) An HCP is a required component of a section 10(a)(1)(B) permit application, which is the means under the Federal ESA to provide incidental take authority to non-Federal entities.
13) Regulatory agencies are not acting responsibly by promoting an HCP.	13) An HCP is one of the tools available to assure compliance with the Federal ESA.
14) Why does CALFED think that an HCP will be adequate when existing regulations have failed to protect resources?	14) One of the goals of the CALFED Program is to restore and protect the ecosystem. An HCP/NCCP will help define the CALFED Program in more detail to ensure that such protection occurs.
15) Why is there so much focus on permits for the ESA if a major focus of CALFED is environmental restoration?	15) Incidental take of listed species may occur as a result of some restoration actions, as well as implementation of other CALFED Program actions. To comply with the Federal ESA, incidental take must be authorized through either a section 7 consultation (for Federal entities) or a section 10 permit (for non-federal entities).
16) An HCP is only appropriate at a project-specific level when project-specific impacts can be assessed.	16) Programmatic HCPs are allowable under section 10 of the Federal ESA. CALFED is in the process of determining how a programmatic HCP could be structured for the CALFED Program.
17) The CALFED and HCP development process should consider nonstructural, non-facility alternatives. Too much focus is placed on storage and conveyance.	17) Comment noted.
18) Concerned about the expense of developing a CALFED HCP.	18) Developing and implementing a conservation strategy and an assurances package, and complying with the State and Federal ESAs for a program as complex as CALFED will be expensive. The actual cost of developing an HCP/NCCP has not been determined.
19) Has the decision to complete an HCP already been made?	19) Yes. CALFED has determined that an HCP/NCCP component is an appropriate mechanism for receiving incidental take authority for certain non-Federal actions. CALFED has not, however, determined the geographic scope of the HCP/NCCP or what activities will be covered by the HCP/NCCP.

20) With regard to timing, how will the decision on a preferred alternative correlate with a decision on the inclusion of an HCP?	20) The draft Programmatic EIS/EIR will include a discussion of ESA compliance, including a decision on how to move forward with the development of an HCP.
21) Beginning an HCP now is appropriate and important for ecosystem restoration implementation.	21) Comment noted.
22) USFWS should consider the suitability of an HCP outside of the parameters set by CALFED.	22) Comment noted.
23) CALFED should demonstrate the advantages and disadvantages of preparing an HCP.	23) CALFED is examining the advantages and disadvantages of developing an HCP/NCCP both through the public scoping process and in discussions among the CALFED agencies. The Programmatic EIS/EIR will discuss the reasons behind a decision to develop an HCP/NCCP.
24) CALFED should demonstrate the link between an HCP and ERPP.	24) The ERPP will likely form the basis for the HCP/NCCP.
25) CALFED (including plans and scientific basis) should be developed in a manner that enables it to conform to the standards of an HCP and act as a "functional equivalent" to an HCP.	25) Comment noted. Ideally, the CALFED Program documents will contain all or most of the necessary elements of an HCP/NCCP.
26) A middle-path marketing approach, which provides farmers with credit for positive actions, should be pursued.	26) A variety of conservation strategies, including landowner/participant "incentives," will be considered as part of the HCP/NCCP.
27) Extraordinary circumstances place burden on fish.	27) Comment noted.
28) Delta outflows (west) need to be addressed before developing an HCP.	28) Flows will be addressed in the CALFED Program and also will be considered in the development of an HCP/NCCP.
29) CALFED should consider removing Delta pumps.	29) Comment noted.

30) Is CALFED planning to "enhance" habitats? If so, will lower or junior appropriators or other users be a source for this water? Are San Joaquin River water-users rights being addressed by CALFED?	30) CALFED plans to restore the Bay-Delta ecosystem, as described in the ERPP. Methods for achieving the specific goals of the ERPP will be specified in that document. The geographic scope of the CALFED Program includes the San Joaquin River watershed; the geographic scope of the HCP/NCCP has not yet been determined.
31) Why doesn't the California Department of Fish and Game address the problems on the mainstem of the San Joaquin River?	31) The San Joaquin River is included in the scope of CALFED's actions. CDFG is an active participant in the CALFED process.
32) Landscape ecology is difficult to subject to standards, but CALFED should pursue.	32) Comment noted.
33) Costs for protecting public trust interests should be borne by the resource users.	33) Comment noted.
34) Historically, government enforcement has not been successful.	34) Comment noted.
35) Water is the reason that species are in decline.	35) Comment noted.
36) Resource agencies have a greater responsibility for public trust assets than for the concerns of federal water contractors.	36) Comment noted.
37) What public interest is served by the State trustee agencies acting through CALFED?	37) Response forthcoming.
38) The CALFED schedule is too tight.	38) Comment noted.
39) Comments on the HCP should be accepted throughout the development process.	39) CALFED will seek public comment and involvement throughout the development of an HCP/NCCP.
40) The Notice of Preparation (NOP) is inconsistent with the CEQA Guidelines. CALFED should conduct an Initial Study, expand the NOP, and recirculate the NOP through the State Clearinghouse.	40) The NOP is consistent with CEQA Guidelines and has been circulated through the State Clearinghouse.
41) Impacts on agriculture must be considered.	41) The Programmatic EIS/EIR should consider impacts of the CALFED Program on agriculture. If an HCP/NCCP results in any additional impacts to agriculture, those impacts would be addressed through the CEQA/NEPA process.

ROLES AND JURISDICTION OF AGENCIES QUESTIONS AND COMMENTS	RESPONSE
42) Is it appropriate for State agencies to be permittees?	42) Yes, under section 10 of the Federal ESA, it is appropriate for any non-Federal entity to hold a section 10(a)(1)(B) permit.
43) Who will be the lead agency with respect to federal agencies with differing jurisdictions?	43) With respect to an HCP, approval authority lies with both the USFWS and NMFS, with each agency being responsible for the species under its jurisdiction. With respect to NEPA compliance for the issuance of a section 10(a)(1)(B) permit, the USFWS and NMFS would be co-lead agencies along with the Bureau of Reclamation as the lead agency for the Programmatic EIS/EIR.
44) Clarify CDFG's authority to require other State agencies and private parties to undertake actions contained in an NCCP.	44) CDFG has the authority to require the signatories of an NCCP to undertake the actions they agreed to in a signed NCCP through the NCCP's Implementing Agreement.
45) USFWS should have ultimate authority on HCP-related decisions.	45) USFWS and NMFS would have clearly defined authority and responsibilities for HCP-related decisions, including making the determination of whether the HCP/NCCP meets the statutory issuance criteria for a section 10(a)(1)(B) permit.

HCP PREMATURE/CALFED TOO COMPLEX QUESTIONS AND COMMENTS	RESPONSE
46) CALFED is a complicated planning process and an HCP would confuse the process.	46) Comment noted. CALFED acknowledges the complexity of its program and recognizes that an HCP/NCCP also will have to deal with complex issues.
47) Based on previous experience, the CALFED proposed HCP is too large and is a mistake to pursue. An HCP might occur at the expense of habitat and species.	47) The scope of an HCP/NCCP for CALFED has not yet been determined; an HCP/NCCP will most likely only cover parts of the CALFED Program. The intention of an HCP/NCCP is to provide for recovery and long-term protection of species; therefore, an HCP/NCCP should not occur at the "expense" of species or their habitats.
48) Inclusion of an HCP in CALFED is premature and inappropriate.	48) Comment noted. CALFED acknowledges that an HCP/NCCP could only be as detailed or developed as the CALFED Program at any phase or stage; therefore, development of an HCP/NCCP at this stage would necessarily be "programmatic."
49) The project should be fully defined before an HCP is developed to allow for identification of impacts and mitigation. Not doing so is contrary to CEQA and NEPA.	49) As noted above, an HCP/NCCP developed at this stage would be programmatic in nature. Most likely, specific projects or actions, as they become defined in future phases, would require new or supplemental HCPs or amendments to an existing HCP/NCCP. The intention of scoping at this stage is to make the public aware of the inclusion of an HCP/NCCP in the CALFED Program and solicit public input in the process of its development. All actions to be taken pursuant to the CALFED process will be analyzed in the EIS/EIR as required by CEQA and NEPA.
50) An HCP should be shelved until assurances package and ERPP have been put in place. HCP and ERPP should be delivered together.	50) The analysis of the feasibility of an HCP/NCCP has to begin now to consider including such a plan as one tool in an overall assurances package. It is CALFED's intention that the ERPP would form the foundation of an HCP/NCCP, with the latter helping to shape and define the specific actions to be carried out under the ERPP.

SCOPE OF ACTIVITIES TO BE COVERED BY HCP QUESTIONS AND COMMENTS	RESPONSE
51) Existing operations and operating criteria should be included in a CALFED HCP.	51) The scope of actions to be covered by an HCP/NCCP has not yet been determined.
52) Will the HCP include urban water use efficiency and State Water Project (SWP) service area water use efficiency?	52) Water use efficiency is a common element included in all CALFED alternatives. However, CALFED has not yet determined whether water use efficiency actions will be covered by an HCP/NCCP. One factor that will be considered in determining what actions might be covered under an HCP/NCCP is whether the action is likely to result in "take" of listed species.
53) An HCP should only cover actions that are well defined. There are too many unknowns, including actions and mitigation measures, to develop a satisfactory HCP at this time.	53) See responses to comments 48 and 49, above. In addition, another possible scenario for bridging a programmatic HCP/NCCP with specific projects and actions would be the development of "subarea" plans in the future. Such subarea plans would contain specific actions and minimization/mitigation measures and would work in conjunction with the programmatic HCP/NCCP. Under such a scenario, incidental take permits might be issued or become effective upon approval of a subarea plan.
54) Will the HCP apply to streamflow decisions made by CALFED? How will that be integrated with water rights decisions?	54) The scope of activities that may be covered by an HCP/NCCP has not yet been determined. Flow requirements specified in the ERPP may become incorporated into an HCP/NCCP if ERPP actions are covered; similarly, other Program activities which dictate flows may be covered in an HCP/NCCP. In addition, an HCP/NCCP could specify additional flow requirements. While the source of water or water rights potentially needed to satisfy the requirements of an HCP/NCCP has not yet been determined, it is CALFED's intention that any water needed above and beyond that allocated for fish and wildlife needs would first be obtained through market transactions and willing sellers.

55) Will the HCP apply to early implementation projects?	55) The HCP/NCCP will not apply to any projects being implemented prior to the release of the final EIS/EIR. Such "early implementation" projects will undergo separate environmental review and ESA compliance.
56) The HCP is inconsistent with ERPP in that the HCP only addresses the mitigation of negative impacts, whereas ERPP addresses the overall ecosystem needs.	56) An HCP/NCCP will ensure that the impacts of any take resulting from covered actions (i.e., "negative impacts") are minimized and mitigated to the maximum extent practicable. Beneficial actions, such as those resulting from implementation of the ERPP, also will be considered in an HCP/NCCP. Such beneficial actions will be considered part of the total mitigation package and would likely offset some portion of the "negative impacts" resulting from the anticipated take of covered species.
57) Will the HCP allocate water? If so, the HCP must be subject to area-of-origin rights and protections.	57) Comment noted. See response to question 54, above.

HCP/NCCP OPTIONS AND ELEMENTS QUESTIONS AND COMMENTS	RESPONSE
58) If an HCP is considered, it should be limited to HCP Option 1 (Standard HCP); however, the following should take place after the project is clearly defined and prior to the development of an HCP: relevant species, habitats, ecosystems, hydrologic processes, and the interactions among each of these should be identified and described, including all potential impacts and the potential for their mitigation.	58) Comment noted. If a programmatic HCP/NCCP is developed, the impacts of the covered Program actions on covered species would be addressed in as much detail as possible; however, the assessment would likely be of a general nature. Subsequent HCPs or supplements or amendments to a programmatic HCP/NCCP may need to be developed in the future when specific projects and actions are defined and the impacts and mitigation can be clearly identified.
59) Prefer HCP Option 2 (Phased HCP with Conditioned Permit) or Option 3 (Phased HCP with Permit Amendments). Would like greater detail on these options.	59) Further details on the three suggested HCP options, as well as any additional options developed during the scoping process, will be provided as they are more fully developed.
60) CALFED should include a wide range of HCP/NCCP alternatives.	60) Comment noted.

<p>61) Original HCP framework probably never anticipated an HCP the magnitude of that being considered by CALFED. If an HCP is used in CALFED it should be designed to match the program and not be based on the existing HCP process.</p>	<p>61) An HCP/NCCP developed for the CALFED Program will follow the requirements and processes defined in the State and Federal ESAs and the Natural Communities Conservation Plan Act. CALFED acknowledges that an HCP/NCCP for the CALFED Program may be unprecedented in scope and complexity; however, CALFED believes that existing laws and regulations provide the flexibility to create an HCP/NCCP that will be consistent with the mission and goals of CALFED and the State and Federal ESAs.</p>
<p>62) The HCP needs to include monitoring, enforcement, adequate funding, and standards to judge adequacy of plan.</p>	<p>62) The Federal ESA and its implementing regulations require that an HCP include measures to monitor, minimize, and mitigate the impacts of any take authorized by the plan, as well as ensure that adequate funding will be available to implement the plan. In addition, the "No Surprises" Policy provides assurances for HCP participants where an HCP is designed to provide an overall net benefit to the covered species and contains measurable criteria for the biological success of the HCP. Further, an HCP/NCCP for the CALFED Program will include an adaptive management process, which will necessitate biological goals or standards.</p>
<p>63) An HCP should include trigger mechanisms that lead to enforcement actions. What types of trigger mechanisms for enforcement are envisioned?</p>	<p>63) Neither "trigger mechanisms" nor enforcement actions have been defined at this point. The HCP/NCCP and/or its Implementing Agreement will specify remedies for failure to comply with the terms of the HCP/NCCP. Ultimately, a section 10(a)(1)(B) permit becomes invalid if the terms of the permit, including implementation of the HCP, are violated.</p>

RELATIONSHIP BETWEEN HCP AND NCCP QUESTIONS AND COMMENTS	RESPONSE
64) What is the difference between an HCP and an NCCP?	64) An HCP must satisfy the requirements of the Federal ESA and an NCCP must meet the requirements of the Natural Communities Conservation Plan Act. In general, an HCP must ensure that the effects of the authorized incidental take of a listed species will be adequately minimized and mitigated and that listed species are not jeopardized; an NCCP provides for the conservation of species using an ecosystem based approach and principles of conservation biology. A single plan can fulfill the needs of both an HCP and an NCCP.
65) How long will the HCP and NCCP work together?	65) CALFED anticipates that an HCP and NCCP will be encompassed in one plan with a term that coincides with the term of the CALFED Program.
66) Is the HCP approved by Federal agencies and the NCCP approved by State agencies?	66) Yes; the USFWS and NMFS have ultimate approval authority for an HCP, whereas CDFG must approve an NCCP.
67) Would the HCP assume an NCCP would be prepared?	67) CALFED is anticipating a joint HCP/NCCP. However, it is possible that an HCP alone could be developed to comply with the State and Federal ESAs.
68) The NCCP Act is insufficient to support a CALFED HCP.	68) An HCP/NCCP developed for the CALFED Program will have to fulfill the requirements of both the NCCP Act and section 10 of the Federal ESA. An NCCP is actually well suited for the CALFED Program because of the focus on ecosystems and conservation of large natural communities.

SCOPING/PUBLIC INVOLVEMENT QUESTIONS AND COMMENTS	RESPONSE
69) The rescoping process to include preparation of an HCP and/or NCCP is necessary.	69) Comment noted.
70) Concerned that HCPs historically include insufficient public input and that citizens/local interests will not be part of the CALFED HCP development process.	70) Public participation has always been and will remain an integral part of the CALFED solution process. CALFED has sought public input on the feasibility of developing an HCP/NCCP through the scoping meetings and submission of written comments; CALFED will continue to seek public involvement in the development of an HCP/NCCP.
71) Scoping meetings should have been scheduled in the Delta area.	71) Initial scoping meetings for the CALFED Program did include a Delta-area meeting. The recent supplemental scoping meetings were held in Redding, Sacramento, Irvine, Los Banos, and Berkeley. In addition, CALFED has held a series of informational meetings throughout the CALFED Program area, including the Delta.
72) Public participation is essential if this process proceeds.	72) See response to comment 70, above.
73) The HCP scoping process will ultimately lead to the preparation of an HCP, thereby setting a poor precedent. Decision to include an HCP should be delayed.	73) The purpose of scoping was to obtain public input on appropriate issues to be addressed with respect to an HCP/NCCP and ideas for the potential structure of an HCP/NCCP. While scoping is a necessary step in the preparation of an HCP/NCCP, it does not preclude a decision to delay or forego altogether the development on an HCP/NCCP.
74) How will the public be included in long-term implementation of HCP?	74) Because an HCP/NCCP has not yet been developed, the role of public involvement in the long-term implementation of the plan is unknown.
75) The HCP scoping process must acknowledge the need to address public trust assets.	75) The entire CALFED process will address public trust resources.

76) Were these public scoping meetings for the HCP legally required?	76) NEPA requires an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action (i.e., scoping). Issuance of a section 10(a)(1)(B) permit by the USFWS and NMFS for all or part of the CALFED Program would be a significant action, requiring scoping. In addition, the CALFED agencies wanted the public to be aware of all elements and potential elements of the Program and have an opportunity for early input.
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GEOGRAPHIC SCOPE OF HCP QUESTIONS AND COMMENTS	RESPONSE
77) Concerned that an HCP will be geographically limited to lower watershed. HCP should address the entire Bay-Delta watersheds, including the habitats above the dams and the Bay and the ocean to the Farallon Islands, to avoid ecosystem fragmentation. HCP should also address offshore influences.	77) Comment noted. CALFED has not yet determined which actions or geographic areas will be covered by an HCP/NCCP; the geographic scope will likely depend, in part, on the actions to be covered. The geographic scope of the HCP/NCCP, however, will be no greater than the geographic scope for the CALFED Program.
78) Concerned that geographic scope is too large and therefore process will be too complex.	78) See response to comment 77, above. Also see responses to comments 46 and 47 earlier in this document.

<p align="center">ASSURANCES QUESTIONS AND COMMENTS</p>	<p align="center">RESPONSE</p>
<p>79) Potential problems with HCP need to be remedied as part of assurances package. A tool needs to be provided that will accommodate for potential HCP shortcomings. As a component of adaptive management, CALFED should look to financial models to provide self-assurance.</p>	<p>79) An HCP/NCCP will become a part of the overall CALFED assurances package. The HCP/NCCP will likely specify the process for dealing with potential biological shortcomings of the CALFED Program through appropriate minimization and mitigation measures and an adaptive management process. Adequate funding to implement an HCP/NCCP, including any adaptive management process included in the plan, must be ensured for the plan to meet section 10(a)(1)(B) permit issuance criteria. CALFED will examine a range of financial models to ensure adequate funding for program implementation.</p>
<p>80) Regulatory assurances must be comparable to restoration actions.</p>	<p>80) Comment noted. Assurances provided to HCP/NCCP participants will be commensurate with the level of protection/conservation for species and their habitats provided by the plan.</p>
<p>81) Assurances should be provided to water users to the extent that they are provided to species and habitats.</p>	<p>81) Comment noted. Assurances provided through the No Surprises policy will extend to HCP/NCCP participants only for the actions and species covered by the plan.</p>
<p>82) Assurances for species protection must be provided, including measurable, objective performance standards and biological goals and objectives.</p>	<p>82) CALFED intends for the ERPP to provide measurable performance standards and biological goals. An HCP/NCCP may help define the biological goals and standards set by the ERPP, as well as impose additional biological goals as necessary, and would include a process of adaptive management to assure that the goals and standards are met. An HCP/NCCP must ensure the protection of the species it covers to meet the statutory criteria for permit issuance.</p>

<p>83) Assurances, such as the No Surprises policy, are at odds with adaptive management.</p>	<p>83) The No Surprises Policy assures HCP/NCCP participants that they will not be required to provide additional compensation beyond the level of mitigation which was provided for under the terms of a properly functioning HCP. If adaptive management is structured into the overall mitigation package of an HCP, it is not at odds with the assurances provided by the No Surprises Policy.</p>
<p>84) Assurances should provide certainty into the future. System must be flexible enough to address changing information and circumstances. "Shelf life" of assurances should be 50-100 years.</p>	<p>84) Assurances provided through the No Surprises Policy provide certainty to HCP participants that no additional mitigation will be required above what is specified in the HCP. As discussed in the response to comment 83 above, an adaptive management component in an HCP provides a means to deal with changing circumstances or new information within the context of the No Surprises Policy. Assurances provided through the No Surprises Policy will be in effect for the term of the section 10(a)(1)(B) permit, which is yet to be determined.</p>
<p>85) An HCP may prove to be an important assurances tool.</p>	<p>85) Comment noted.</p>
<p>86) State and Federal contractors and direct diverters should receive comparable assurances. CALFED should link Sections 7 and 10 processes and explore comprehensive permitting. How will assurances for Federal contractors be addressed? It is necessary to address this subject even if it requires legislation.</p>	<p>86) Assurances provided through section 10 of the Federal ESA via the No Surprises Policy, are intended to provide certainty for non-Federal entities; comparable assurances for Federal entities would have to be provided through other means. CALFED is developing an assurances package which will address assurances for the overall Program, including Federal entities; however, the specifics of an assurances package have not yet been determined. The USFWS and NMFS will conduct a section 7 consultation on the entire CALFED Program, including the development of an HCP/NCCP; in that respect, section 7 and 10 processes are linked, although section 7 does not result in a permit.</p>

87) Clarify the role of Federal projects and elaborate on their eligibility for assurances. Coordinated Operating Agreement makes the California Department of Water Resources (DWR) a Federal entity.	87) Comment noted. See response to comment 86, above.
88) Strongly object if public agencies would use an HCP to obtain regulatory assurances that violate the principle of adaptive management.	88) See responses to comments 83 and 84, above.
89) What assurances will be provided for the protection of public trust resources?	89) The assurances package developed for the overall CALFED Program, which will include an HCP/NCCP as one component, will address public trust resources. As noted above, the details of the assurances package have not yet been developed.
90) Concerned about the level of attention being placed on an HCP when it is only one element of a much larger group of potential assurances.	90) CALFED believes that the development of an HCP/NCCP is a significant enough process to warrant early public involvement. CALFED recognizes that an HCP/NCCP is only one of many tools that will comprise the overall assurances package, and does not believe that discussion or development of an HCP/NCCP precludes development of other assurance tools.
91) Assurances are necessary to maintain broad support for CALFED.	91) Comment noted.
92) Assurances, including those provided through an HCP, allow for long-term planning.	92) Comment noted.
93) Assurances package should be considered as a whole and at a later time.	93) See responses to comments 86 and 90, above.
94) How will enforcement actions be assured?	94) See response to question 63, above.
95a) Will there be scoping for other elements of the assurances package?	95a) The Assurances Work Group, a sub-committee of the public Bay-Delta Advisory Council, is examining a variety of assurance tools for the overall CALFED Program. Because the assurance mechanisms are under development, it is not yet known which elements, if any, will entail formal scoping. The Assurances Work Group conducts informal scoping, in the sense of seeking public input, on an on-going basis.

95b) How is government assurance of funding provided?	95b) With respect to an HCP/NCCP, the permit applicants must provide an assurance to the USFWS, NMFS, and CDFG that adequate funding will be available to implement the plan. Typically, the USFWS and NMFS make a commitment in the HCP and/or its Implementing Agreement to monitor implementation of the HCP and provide appropriate assistance to the permittee, to the extent funding is available and subject to the Anti-Deficiency Act.
96) A balance of power is the best form of assurance, rather than an HCP.	96) Comment noted.
97) Assurances should not be provided until adequate information is available.	97) Comment noted. Assurances provided to HCP/NCCP participants through the No Surprises Policy will be commensurate with the level of protection provided in the plan for covered species/habitats.

NO SURPRISES¹ QUESTIONS AND COMMENTS	RESPONSE
98) The No Surprises Policy is currently too one sided in favor of developers. There needs to be an equilibrium between development and species protection.	98) The No Surprises Policy essentially states that the USFWS and/or NMFS will not require mitigation beyond what is agreed to in an HCP, or stated another way, "a deal is a deal." Thus, it is the terms of the HCP, not the No Surprises Policy, that determines the balance between species protection and development.

¹ The Department of the Interior's August 1994 "No Surprises" Policy provides one form of assurance to section 10(a)(1)(B) permit holders. This policy assures the permittee(s) that the USFWS and/or NMFS will not require the commitment of additional lands or financial compensation beyond the level of mitigation which was otherwise adequately provided for under the terms of a properly functioning HCP. This policy was proposed as a Federal Regulation on May 29, 1997.

99) The Section 7 process is adaptive and does not provide a No Surprises policy; the HCP should be similar.	99) The CALFED HCP/NCCP will contain provisions for adaptive management. It is true that section 7 does not provide No Surprises assurances; however, the CALFED Program will have a comprehensive assurances package designed to ensure that the preferred alternative is implemented as agreed.
100) Address how the No Surprises Policy will apply to areas above the major dams including the Federal Energy Regulatory Commission licensees, U.S. Forest Service, and U.S. Bureau of Land Management. Logging, mining, and grazing should be examined as part of this process.	100) The No Surprises Policy will apply only to those activities and those species that are covered by the HCP/NCCP. Because the scope of the HCP/NCCP has not yet been determined, we do not know if the areas above major dams will be covered by the No Surprises Policy. The No Surprises Policy is intended to provide assurances to non-Federal entities; therefore, it would not cover actions undertaken by FERC, USFS, or BLM.
101) Phased HCP should not require starting over with each new issue (species) addressed. The No Surprises Policy is an important element.	101) Comment noted. The HCP/NCCP will likely address unlisted as well as listed species, regardless of the ultimate structure of the plan and permits. To receive "coverage" for an unlisted species, the HCP/NCCP must treat the species as if it were listed. Incidental take authority for covered unlisted species would then become effective upon their listing under the State and/or Federal ESAs; no amendment to the HCP or permits would be required.
102) Is the Friant water-users area included in the HCP? Will it be eligible for No Surprises Policy?	102) Neither the geographic scope of the HCP/NCCP nor the scope of activities to be covered has been determined. As stated above, the No Surprises Policy will only apply to those actions and those species covered by the HCP/NCCP.
103) How long will the No Surprises Policy last? CALFED needs to address temporal effects.	103) The No Surprises Policy would be in effect as long as the 10(a)(1)(B) permit is in effect, which is yet to be determined.

104) The HCP should be specific and cover a predetermined species list. Limit the No Surprises Policy in time, type, and location.	104) An HCP/NCCP developed during Phase 2 of the CALFED Program, will likely be programmatic in nature. The process for transitioning from programmatic to specific actions, with respect to the HCP/NCCP, has not yet been determined. The HCP/NCCP will clearly indicate the species that are covered by the plan; the HCP/NCCP will either explicitly describe the actions covered by the plan or provide a clear list of criteria which covered actions must meet. The No Surprises Policy will be limited to the activities and species covered by the HCP/NCCP.
105) Why is the No Surprises Policy for water users being analyzed so early in the process?	105) See response to comment 50, above. Further, CALFED has not yet determined whether water users will be covered by the HCP/NCCP.
106) What kind of actions can be taken to solve a problem once a No Surprises Policy is in place? What mechanisms would trigger the need for remediation?	106) CALFED's intention is to develop an HCP/NCCP that identifies and provides remedies for (or processes for resolving) all potential problems that are reasonably likely to occur during the term of the permit. In the event of unforeseen or extraordinary circumstances affecting covered species that are not addressed in the HCP/NCCP, the Federal government has the primary responsibility to remedy such situations.
107) How would the No Surprises Policy apply to flow?	107) No Surprises assurances would only apply to flow to the extent that flow-related actions are covered by the HCP/NCCP; further, such assurances would only apply to those species covered by the HCP/NCCP.
108) The No Surprises Policy is inconsistent with public trust responsibilities.	108) See response to comments 83 and 89, above.
109) What are the USFWS' current thoughts on extending the No Surprises Policy to the U.S. Bureau of Reclamation/Central Valley Project (CVP) water contractors?	109) The No Surprises Policy does not extend to actions undertaken by Federal agencies. As noted above, however, the overall assurances package for the CALFED Program (currently under development) will likely include some form of assurances for Federal water contractors.

<p>110) The No Surprises Policy should not be extended to Federal programs. Assurances can be extended to Federal programs through other mechanisms, such as Section 7 of the ESA. Section 7 can provide an equal level of assurances as well as a stronger legal foundation.</p>	<p>110) Comment noted. CALFED acknowledges that the No Surprises Policy is not applicable to Federal actions. The USFWS and NMFS will conduct a section 7 consultation on the entire CALFED Program.</p>
<p>111) The intent of the No Surprises Policy is to reduce the burden on private property owners and allow Federal agencies to act as the safety net. Extending the No Surprises Policy to Federal agencies would eliminate that role.</p>	<p>111) Comment noted. See responses to comments 100, 110, and 111, above.</p>

ADAPTIVE MANAGEMENT QUESTIONS AND COMMENTS	RESPONSE
<p>112) Adaptive management is critical for ecosystem restoration. HCP options must include adaptive management explicitly. The three HCP options suggested in the Supplemental NOI/NOP do not adequately provide for adaptive management. Adaptive management needs to allow for adjustments that will also be covered by assurances.</p>	<p>112) Adaptive management is an integral part of the ERPP and will also be an important component of the HCP/NCCP. CALFED anticipates that adaptive management will be included in the HCP/NCCP regardless of the ultimate structure of the plan and permits (i.e., whether one of the options described in the Notice or another option altogether is adopted).</p>
<p>113) Adaptive management is necessary because of scientific uncertainty. Causes of mortality are uncertain enough to quantify.</p>	<p>113) Comment noted. CALFED agrees that adaptive management is a necessary component of an HCP/NCCP.</p>
<p>114) Surprises are inherent in an adaptive management process.</p>	<p>114) Comment noted.</p>
<p>115) What is the regulatory mechanism that will allow the adaptive management process to alter flows if deemed necessary?</p>	<p>115) If flow-related actions are covered by the HCP/NCCP and the adaptive management process specifies changes in flow as a means to meet a biological objective, the regulatory mechanism for implementing such changes is the State and Federal ESAs.</p>

116) Adaptive management as it relates to CALFED needs to be thoroughly explained.	116) CALFED will continue to develop and refine a process for adaptive management with respect to both the ERPP and the HCP/NCCP. The adaptive management component of the plan will be explained in the CALFED Program documents and/or the HCP/NCCP .
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TAKE/SPECIES QUESTIONS AND COMMENTS	RESPONSE
117) CALFED should be equitable by matching guarantees for water users with guarantees for species.	117) See responses to comments 81, 86, and 110, above.
118) CALFED should impose penalties if take goes beyond specified limits.	118) The section 10(a)(1)(B) permit will specify that only the level of take described in the HCP/NCCP is authorized. Take in excess of that allowed by the HCP/NCCP would either trigger a remedial or adaptive measure (which would be specified in the HCP/NCCP) or would constitute a violation of the permit, depending on how the HCP/NCCP is written.
119) Will State-listed species be included?	119) The list of species to be covered by the HCP/NCCP has not been finalized; however, CALFED intends to cover state-listed, federally listed, and unlisted species in the HCP/NCCP.
120) What happens to unforeseen species and species not included in the HCP/NCCP? What is the status of CDFG take authorization as it relates to species not presently listed but included in the HCP? What happens with future listings?	120) If a species that is not covered by the HCP/NCCP becomes listed in the future under either the Federal or State ESA <i>and</i> CALFED Program actions are likely to result in take of that species, CALFED would need to obtain incidental take authority through either section 7 or section 10 of the Federal ESA and/or through one of the State ESA processes. The state may authorize the take of unlisted species which are covered by the HCP/NCCP under Section 2835 of the Fish and Game Code.
121) Will the HCP address all species of concern listed in the ERPP?	121) The list of species to be covered by the HCP/NCCP has not been determined at this time.

122) Concern over species scope. How will Trinity River region/water be addressed?	122) At this stage of HCP/NCCP development, CALFED has not determined the geographic scope of the plan or the actions that will be covered by the plan. Until these decisions are made, a final determination on the species to be covered in the HCP/NCCP cannot be made.
123) Incidental take permit puts species at risk.	123) Incidental take permits are only issued upon completion and approval of an HCP and/or NCCP which minimizes and mitigates impacts and that does not appreciably reduce the likelihood of survival and recovery of covered species.
124) Incidental take permits should be revoked if established milestones and schedules for achieving predetermined measures of both individual species and ecosystem integrity are not met.	124) The conditions under which a permit would be revoked or suspended will be detailed in the HCP/NCCP and/or its Implementing Agreement. It is likely that failure to meet a biological goal or standard would trigger a remedial or adaptive measure, rather than immediate permit revocation or suspension. However, the plan will likely have some provision to deal with catastrophic failure with respect to the species and habitats covered by the plan.
125) The HCP will allow take immediately while restoration actions will be implemented over a very long period with unknown results.	125) Because the scope of the HCP/NCCP has not yet been determined, we do not know at what stages of the plan authorized take will occur. In general, however, HCPs are structured so that mitigation is either in place prior to or simultaneous with the occurrence of take. Further, mitigation, including restoration actions, will have specific goals and objectives, which if not met would trigger remedial or adaptive measures.
126) Incidental take permit should not be issued prior to project-specific evaluations.	126) Comment noted. Also see response to comment 49, above.
127) Species that may become endangered/ listed in the future need protection.	127) CALFED anticipates covering species in the HCP/NCCP that are currently unlisted but may become listed during the term of the CALFED Program. In general, to receive coverage for an unlisted species, an HCP must not contribute to the need to list that species in the future.

128) Proposed scope of incidental take permit is too broad.	128) The scope of the HCP/NCCP and its associated incidental take permits has not yet been determined.
129) USFWS should closely supervise the permitting process while the HCP is being developed.	129) The USFWS, NMFS, and CDFG will all be involved throughout the development of the HCP/NCCP. Any projects that are implemented prior to completion of the HCP/NCCP and section 7 consultation for the CALFED Program, will undergo their own ESA compliance.
130) Implementation agreements should be the basis for ESA take authorizations.	130) The HCP/NCCP, which must fulfill the statutory issuance criteria, is the basis for the incidental take permits. An Implementing Agreement is a legally binding contract that articulates the responsibilities of each party established under an HCP.
131) The belief that the HCP process is the only option to allow take is dangerous and unnecessary.	131) CALFED recognizes that there are several mechanisms to authorize take under both the State and Federal ESAs.
132) Implementation of the ERPP should have some mitigation value and should be considered part of the mitigation package for take under ESA.	132) The ERPP will likely be an integral part of the HCP/NCCP. The beneficial impacts of the ERPP will certainly be considered in the plan, however, the overall role of the ERPP as "mitigation" for the CALFED Program has not yet been determined.
133) USFWS, NMFS, and DFG should, on approval of the CALFED Implementation Agreement, list all species that, by any biological measure, should have been listed long ago but haven't been because of power politics. No party to the CALFED Implementation Agreement should be affected by the listings because they are completely covered under the HCP's implementation agreement.	133) Comment noted.

MITIGATION QUESTIONS AND COMMENTS	RESPONSE
134) Is saltwater intrusion included in water quality program? Will the flooding of agricultural land with saltwater to create habitat meet federal goals?	134) Saltwater intrusion is a component of the Water Quality Program. We are not certain we understand the second question; the Federal government does not have specific "goals" with respect to the use of agricultural lands to create tidal or saltwater habitat.
135) Is HCP mitigation intended to mitigate for take authorization or to mitigate for species recovery plan?	135) An HCP, as required by the statutory issuance criteria, must minimize and mitigate the impacts of the take resulting from the actions covered by the plan to the maximum extent practicable. To the extent that ERPP actions (which can be seen as "recovery" actions) are covered by the HCP/NCCP, any resulting take would require mitigation; however, the ERPP itself may also provide adequate mitigation for some or all of the incidental take that it incurs.
136) How will individual projects within the geographic scope of the HCP determine the range of mitigation, limits on geographic scope of mitigation, and priority for in-kind onsite mitigation?	136) Once CALFED has determined the scope of the HCP/NCCP (geographic scope, as well as the actions to be covered), appropriate mitigation will be determined. The extent, location, and type of the mitigation required will reflect the impact of the take on the species affected. Prioritization of on-site, off-site, in-kind and out-of-kind mitigation has not yet been determined; each of these types of mitigation may have appropriate uses (i.e., provide the greatest biological benefits) depending on the particular situation.
137) What is CALFED doing with regard to mitigation on the San Joaquin River?	137) The ERPP provides for some restoration on the San Joaquin River, primarily on its tributaries. The role of the San Joaquin River in the HCP/NCCP has not yet been determined.
138) The HCP process must allow for future additional mitigation. Water users should pay for additional mitigation, not taxpayers.	138) Comment noted.

<p>139) CALFED should provide for ESA take authorizations for the implementation of ERPP projects without the need to mitigate for take that occurs as a result of the restoration action. ERPP should be viewed as self-mitigating.</p>	<p>139) See response to comment 136, above. The extent to which the ERPP is "self-mitigating" has not yet been determined.</p>
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<p>SCIENTIFIC REVIEW QUESTIONS AND COMMENTS</p>	<p>RESPONSE</p>
<p>140) Scientific review is essential if process proceeds.</p>	<p>140) Comment noted. CALFED and the Bay-Delta Advisory Committee are developing a scientific review process.</p>